

(2017) 12 OHC CK 0007

In the Orissa High Court

Case No : 24873 of 2017

Krishna Kumar B.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 11-12-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court

Citation : (2017) 12 OHC CK 0007

Hon'ble Judges : S.N.Prasad

Bench : SINGLE BENCH

Advocate : Kali Prasanna Mishra, S.Mohapatra, T.P.Tripathy, L.P.Dwivedy, Raj Bimal Das, S.C.Dash, S.N.Jena

Judgement

1. This writ petition under Articles 226 and 227 of the Constitution of India whereby and where under the petitioner has prayed for issuance of direction upon the opposite party no.3 to place the petitioner's seniority below the 2002 recruitees of the East Coast Railways in terms of the Standing Order No.70, 17B(b) and thereby allow the petitioner for promotion to the post of Head Constable by way of cadre restructuring.

2. Brief facts of the case of the petitioner as pleaded the writ petition is that he has been enlisted as Constable in the year 2001 and recruited in the year 2002 under the South Central Railway. He was transferred from South Central Railway to East Coast Railway vide Battalion Order No.46/2009. It has been stated that all enrolled members under the Railway Protection Force are eligible for inter-zone transfer after completion of seven years of service. In view of the transfer policy issued in the year 2006, the Constables who have completed seven years of service, can be recommended for inter-zonal transfer on availability of vacancies. The petitioner, accordingly has submitted his willingness to transfer from South Central Railway to East Coast Railway on the basis of the amended provision issued by the authorities vide Standing Order No.70 and 17(B)(b) that

his seniority shall be placed below the batch mates of his rank. The petitioner joined the East Coast Railway in the year 2009 but the East Coast Railway while releasing the provisional gradation list of Constables on 1.4.2017 placed him at bottom seniority of the year 2009 instead of 2002 batch mates. Accordingly he has been placed at serial no.303. The petitioner filed his objection to the provisional gradation list placing him at serial no.303 instead of placing his seniority below the batch mates and directed to submit memorandum before the Zonal Headquarter and while the matter was pending before the Zonal Headquarter, opposite party no.2 has released list of 153 Constables for promotion by way of restructuring the cadre, hence this writ petition has been filed.

3. Opposite party no.2 has filed counter affidavit sworn by the I.G. and Chief Security Commissioner, Railway Protection Force, East Coast Railway, Rail Sadan, Chandrasekharapur, Bhubaneswar, inter alia, therein it has been stated that the petitioner was appointed as Constable in 7th Battalion/RPSF/Secunderabad on 23.4.2002 vide Battalion Order No.46 of 2009, he was transferred, on his own request, to the East Coast Railway on bottom seniority, after joining East Coast Railway on own request basis, he was posted to Waltair Division on the condition of bottom seniority. It has been stated that the RPF personnel seeking inter-zonal transfer on own request should be ready to go on bottom seniority in the same rank and accordingly the petitioner has accepted the same without raising any grievance against such seniority. It has been further contended that on the basis of the Rule 99.2 of the Railway Protection Force Rules,1987 which clearly specifies that the seniority of members of the Force transferred from a Zone/RPSF to any other zone on his own request shall be fixed below all the existing members of the Force in the relevant rank in the Zone, as such not only the petitioner but all the Constables who joined East Coast Railway on own request transfer have been placed at the bottom of the seniority list below the Constables appointed till their joining in East Coast Railways. It has been contended that amendment to the Standing Order No.70 on which reliance has been placed by the petitioner to claim seniority below his batch mates was contrary to the provisions of Rule 99.2 of the Railway Protection Force Rules,1987, hence the matter was reconsidered and in supersession of the Standing Order No.70 and the amendment thereto, Standing Order No.102 was issued. Clause 3(C)(ii) of the Standing Order provides that the enrolled members of the Force transferred from RPSF to RPF and in RPF from one Zonal Railway to another on own request or on mutual transfer, shall go on bottom seniority of their rank in terms of Rule 99.2 of RPF Rules,1987 and in view of the settled position since the petitioner has accepted his transfer on bottom seniority, his claim to fix his seniority in the seniority list at the bottom of his batch mates of Constables of his batch is not sustainable. The opposite party, on the strength of such plea, has submitted that the petitioner has failed to make out his case, hence the writ petition may be dismissed.

4. Heard learned counsel for the parties and on appreciation of the rival

submissions, it is evident that the petitioner is claiming his seniority on the basis of the provision of the Standing Order No.70 read with the communication dated 9.8.2006 under Annexure-2. This Court has thought it proper to go into the legal position as also the principles framed by the opposite party by issuing Standing Order communicated vide communication dated 9.8.2006, before passing of the order effectively which the petitioner has raised in this writ petition. The petitioner since working under the Railway Protection Force and as such he is coming under the provision of the Railway Protection Force Act, 1957 and the Rules, 1987. Rule 99 of the Railway Protection Force Rules, 1987 which provides determination of seniority on inter-zonal transfer. Rule 99.1 contains provision in case of transfer order in interest of administration which provides seniority of an enrolled member of the Force on transfer from one zone to another or to the Railway Protection Special Force and vice versa made in the interest of administration shall be regulated by the date of appointment to the grade or rank as the case may be, where the date of appointment of the transferred member of the Force is the same as that of another member of the Force already serving on that zonal railway or Railway Protection Special Force, the relative seniority shall be determined on the basis of the date of birth, the elder being the senior. Rule 99.2 contains provision of transfer on own request or on mutual exchange, which provides seniority of an enrolled member of the Force transferred on his own request or on mutual exchange from one zonal railway to another or to the Railway Protection Special Force and vice versa shall be fixed below that of all existing confirmed and officiating enrolled member of the Force in the relevant rank of that railway or Railway Protection Special Force irrespective of the date of confirmation of length of officiating service of the transferred member of the Force. It is evident from the two provisions of the Rules i.e. as contained in Rule 99.1 which relates to transfer on administrative ground and as such provision has been made to determine the seniority of inter-zonal transfer on the basis of date of appointment while provision as contained in Rule 99.2 is in the case of transfer on own request or mutual exchange wherein it has been provided that seniority of an enrolled member of the Force transferred on his own request or on mutual exchange from one zonal railway to another or to the Railway Protection Special Force and vice versa shall be fixed below that of all existing confirmed and officiating enrolled member of the Force in the relevant rank of that railway or Railway Protection Special Force irrespective of the date of confirmation of length of officiating service of the transferred member of the Force.

5. Railway Protection Force has come out a Standing Order No.70 which contains provision under condition No.17(B)(b) and that is in consonance with the provision of Rule 99.2 of the Railway Protection Force Rules, 1987, the same is being referred below as under: "He should be ready to go on bottom seniority in the same rank." The authorities have come out with communication dated 9.8.2006 issued by the Deputy Inspector General (Administration) Railway Board on the basis of the approval of the Director General/RPF for amendment to the

Standing Order No.70 that "he should be ready to go on bottom seniority of his batch mates in the same rank". The authorities have come out another Standing Order No.102 containing therein that the enrolled member of the Force transferred from RPSF to RPF and in RPF from one zonal railway to another on own request or on mutual transfer, shall go on bottom seniority of their rank in terms of Rule 99.2 of RPF Rules,1987. In view of this legal position the case of the petitioner needs to be scrutinized as to whether the contention raised by the petitioner is in accordance with law or not?

6. The factual aspect which is not in dispute in this case is that the petitioner was enlisted as Constable in the year 2001 and recruited in the year 2002 under the South Central Railway. He has given option to be transferred from South Central Railway to East Coast Railway, accordingly his request was considered and was transferred from South Central Railway to East Coast Railway in the year 2009 vide Battalion Order No.46/2009 under Annexure-1 annexed to the writ petition wherein it has been stated that the petitioner has been transferred by placing him on bottom seniority along with other terms and conditions. The petitioner after accepting the order of transfer has given his joining in the East Coast Railway and started his duty there. The authorities have come out with provisional seniority list of Constable/RPF on 1.4.2017 in which the petitioner has been placed bottom in the seniority list having his position at serial no.303. Grievance of the petitioner is that he should have been placed just below his batch mates i.e. at serial no.97 and to that effect he has filed objection but instead of deciding the same, he has been directed to place before the higher authority and the same is pending but the authorities are going to give promotion to the post of Head Constable by restructuring the cadre from the said provisional list.

7. This Court, on examination of the factual aspect, has found that the petitioner has submitted application for inter-zonal transfer and accordingly the same has been acceded to vide order dated 21.3.2009 and in view thereof, he has been placed at serial no.303. The petitioner claims to be placed at serial no.97 on the ground stated under Annexure-2 dated 9.8.2006 but the same is not sustainable for the following reasons. (i) The petitioner is coming under the provision of Railway Protection Force Rules,1987 which contains Rule 99.2 dealing with cases of transfer on own request or on mutual exchange, which provides seniority of an enrolled member of the Force transferred on his own request or on mutual exchange from one zonal railway to another or to the Railway Protection Special Force and vice versa shall be fixed below that of all existing confirmed and officiating enrolled member of the Force in the relevant rank of that railway or Railway Protection Special Force irrespective of the date of confirmation of length of officiating service of the transferred member of the Force. Thus it is evident that the statutory provision provides transfer on mutual exchange or own request, one has to give up his seniority by accepting seniority of all existing confirmed and officiating enrolled member of the Force in the relevant rank of that railway or Railway Protection Special Force irrespective of the date of

confirmation of length of officiating service of the transferred member of the Force. In view of such specific statutory provision, the petitioner cannot claim that he be placed on the basis of his batch mates otherwise it will be held to be contrary to the Rule 99.2 of the Railway Protection Force Rules,1987.

(ii) The Ministry of Railways has come out Standing Order No.70 wherein also the provision has been made in consonance with the provision of Rule 99.2 of the Railway Protection Force Rules,1987 that an employee seeking transfer on own request or mutual exchange be ready to go on bottom seniority in the same rank.

(iii) The petitioner claims seniority on the basis of the communication dated 9.8.2006 which is by way of clarification issued under the signature of DIG(Administration), Railway Board clarifying standing order no.70 of its provision contained in para-17B(b) "he should be ready to go on bottom seniority of his batch mates in the same rank", but according to the petitioner, under Annexure-6 order has been passed showing him to be placed on bottom seniority of his batch mates but placing him at serial no.303 i.e. bottom in the seniority list which is contrary to the clarification of the communication dated 9.8.2006, but this argument is not sustainable in the eye of law in view of the fact that any administrative instruction issued by any authorities which is in consistence with the Statutory Rule, will have no legal force since the proposition in this regard is settled that any executive instruction can only supplant the rule not to supplement it further if executive instruction is in consistence with the rule, it is the rule which will prevail and not the instruction or guideline, reference in this regard may be made to the judgment rendered by the Hon"ble Supreme Court in the case of Ratan Kumar Tandon and Ors. Vs. State of U.P., reported in 1997 (2) SCC 161 and Public Service Commission, Uttaranchal -v- Jaqgdish Chandra Singh Bora, reported in (2014) 8 SCC 644. In view thereof the communication dated 9.8.2006 is held to be contrary to the provisions of Rule 99.2 of the Railway Protection Force Rules,1987, that is the reason the Ministry of Railway has again come out with Standing Order No.102 which provides that inter-zonal transfer on own request or on mutual exchange the employee has to go on bottom seniority of their rank in terms of Rule 99.2 of the RPF Rules,1987 In view thereof, the petitioner cannot get aid/help in terms of the communication dated 9.8.2006 for the reasons aforesaid.

8. Learned counsel for the Railway has placed reliance to the Standing Order No.102 by which the same has been issued in the month of March,2010 and as such the same will not be applicable with respect to the claim of the petitioner since provisional gradation list has been prepared in the year 2009 and it is settled that any decision cannot be implemented with retrospective effect but this principle of the retrospective effect will not be applicable in the facts and circumstances of the case for the reason that the Standing Order No.102 is not a new decision taken by the Ministry of Railways to its Railway Board rather it is reiteration of the statutory rule as contained in Rule 99.2 of the RPF Rules,1987 and accordingly when the DIG has come out with instruction on 9.8.2006, the

competent authority i.e. the Railway Board, in order to clarify the position has come out with the clarification regarding making the communication dated 9.8.2006 as ineffective for the reason that the same is contrary to the statutory provision as contained in Rule 99.2 of the RPF Rules, 1987. In view thereof, the argument advanced on behalf of the petitioner regarding retrospective effect is not sustainable and the same is rejected.

9. Learned counsel for the petitioner submitted that the provisional list has not yet been finalized and the authority after restructuring is going to give promotion, and to that it has been stated at para-3(e) that the competent authority has heard the grievance and directed to submit the memorandum before the Zonal headquarter and on perusal of the Annexure-8 dated 11.9.2017 it is evident that the authorities have considered the claim of the petitioner and advised him to submit the memorandum of certification of seniority list of the CTS by the Zonal headquarters but it is not pleaded in the writ petition as to whether they have raised their grievance before the Zonal Headquarters or not and it is settled that in absence of any pleading to that effect, no direction can be issued for deciding the objection.

10. Accordingly and considering the reasons aforesaid, the petitioner fails to make out a case, hence the writ petition fails and it is dismissed.